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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PAULINE MULLINS, HAPPY DAY, INC., AND BROWN BEAR, INC.,
Petitioners,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTIONS PRESENTED

1. Whether a search warrant based upon an affidavit containing conclusory assertions by a police officer and signed by a magistrate who participated in the investigation leading to conviction of Petitioners, is constitutional?

2. Whether the prosecutor's improper comments on the accused's failure to testify, his interjection of personal beliefs, and his misstatements of the burden of proof constitute prejudicial error?

3. Whether the Commonwealth of Kentucky obscenity statute KRS .531.010 et seq. and related sections, is unconstitutional as written and applied?

4. Whether Petitioners' First and Fourteenth Amendment rights were violated when the trial court substituted for Petitioners' jury instructions of "tolerance" in determining contemporary community standards, the much narrower standard of "acceptance"?

5. Whether Petitioners' rights to disseminate materials protected by the First and Fourteenth Amendments to the Constitution of the United States were impermissibly chilled by the trial courts' instruction of "pandering" even though no evidence of "pandering" was adduced at trial?

6. Whether evidence which shows that Petitioners neither knew the nature, nor the character and contents of the sexually explicit materials exhibited is constitutionally sufficient to support a conviction on the issue of scienter?

7. Whether the materials charged against Petitioners constitute protected expression under the First and Fourteenth Amendments to the Constitution of the United States because they are not obscene as a matter of law?

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COMMONWEALTH OF KENTUCKY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioners respectfully pray that a Writ of Certiorari issue to review the order denying discretionary review entered in the above case by the Supreme Court of Kentucky on April 13, 1982.

OPINION BELOW

The order of the Supreme Court of Kentucky denying discretionary review is not yet reported but is set forth in Appendix A hereto. Discretionary review was also denied by the Court of Appeals of the Commonwealth of Kentucky and a copy of said denial is set forth in Appendix B. The order and judgment of the Campbell Circuit Court, Division One, of the Commonwealth of Kentucky, affirming the District Court is attached hereto as Appendix C.

JURISDICTION

The judgment and order of the Campbell Circuit Court, Division One, Commonwealth of Kentucky, affirming the District Court's judgment, was entered on November 16, 1981. On appeal, discretionary review of said judgment and order was denied by the Court of Appeals for the Commonwealth of Kentucky on January 27, 1982. Upon application for discretionary review of said denial to the Supreme Court of Kentucky, that Court also denied discretionary review by order of April 13, 1982. This Court's jurisdiction is invoked under Title 28 United States Code Ann. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution are set forth in Appendix D hereto.

STATEMENT OF THE CASE

On April 2, 1982, Bruce Collins, a police officer with the Campbell County Police department, accompanied by Campbell County District Judge Leonard L. Kopowski, and Assistant Prosecutors Justin D. Verst and William J. Wehr, viewed the motion picture films "Getting Off" and "Painful Desires" at the Cinema X Theatre in Newport, Kentucky. On April 7, 1982, the officer obtained a search warrant, signed by Judge

Kopowski, authorizing the seizure of the two motion picture films. Upon seizure, the Commonwealth of Kentucky charged Pauline Mullins, an employee of the theater, with Distribution of Obscene Matter in violation of KRS 531.020 which was subsequently amended to Criminal Facilitation at Distribution of Obscene Matter in violation of KRS 506.080. The landowner of Cinema X Theatre, Brown Bear, Inc. was charged with Criminal Facilitation at Distribution of Obscene Matter in violation of KRS 506.080, and a licensee, Happy Day, Inc. was charged with Distribution of Obscene Material in violation of KRS 531.020.[1]

A hearing to suppress the evidence seized was held, at which Officer Bruce Collins testified that he viewed the two motion picture films on April 2, 1982 with the understanding that "children" as well as "serious literary, artistic, political and scientific value" were included in the determination of the contemporary community standard, and this is how he interpreted the Kentucky obscenity statute when he made the affidavit upon which the search warrant rested.

At trial below, the testimony disclosed that Pauline Mullins was not inside Cinema X Theatre when the motion picture films at issue were shown. At the conclusion of the trial, the jury found all three Petitioners guilty as charged and assessed the following fines: Pauline Mullins fined $50.00 and court costs; Happy Day, Inc. fined $10,000.00; Brown Bear, Inc. fined $5,000.00.

Petitioners appealed their convictions to the Campbell Circuit Court, which affirmed the same in an order and judgment, but without explaining the reasons for the affirmance. The Court of Appeals of Kentucky and the Supreme Court of Kentucky subsequently denied discretionary review by orders of January 27, 1982 and April 13, 1982 respectively. Petitioners seek review from the Supreme Court of Kentucky's denial of discretionary review.

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[1] All parties hereto are listed in the caption of the case.

REASONS FOR GRANTING WRIT

I.

A Search Warrant Which Is Based Upon An Affidavit Containing Conclusory Assertions By A Police Officer And Signed By A Magistrate Who Participated In The Investigation Leading To Conviction Of Petitioners, Is Unconstitutional.

At the proceedings below, Petitioners moved to suppress the evidence seized on the basis of the constitutionally insufficient affidavit upon which the search warrant was based, and upon the further basis that Judge Kopowitz had participated in the investigation. The motion was denied, and the motion picture films seized were admitted into evidence.

The affidavit upon which the search warrant was based, was constitutionally insufficient. First, because it failed to describe the films "Getting Off" and "Painful Desires" in terms of theme, story line, physical conduct of the actors, and focus of the camera. Second, because the officer asserted that he "read and reviewed KRS 531 concerning pornography and . . . determined that said films" are obscene under the tri-partite Kentucky obscenity test. The execution of the search warrant based on this affidavit and the resulting seizure violated Petitioners' Fourth and Fourteenth Amendment rights to the United States Constitution. Mr. Chief Justice Burger, writing for the majority, in *Roaden v. Kentucky*, 413 U.S. 496 (1973) has stated the search and seizure standard as follows:

> "The constitutional requirement that warrants must describe the things to be seized is to be accorded the most scrupulous exactitude when the things are books, if the basis for their seizure is the ideas which they contain." *Id.* at 504.

A sufficient description of the items to be seized permits that the procedure under which a warrant is issued is "focused searchingly" on the question of obscenity, and it prevents that the warrant falls short of the "constitutional requirement demanding necessary sensitivity to freedom of expression."

Lee Art Theater v. Virginia, 392 U.S. 636, 639 (1968). This Court has made it clear in *Marcus v. Search Warrant*, 367 U.S. 717 (1961) that:

> "warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered . . . obscene" *Id.* at 732

must be suppressed. The affidavit upon which the search warrant is based, falls short of satisfying the constitutional requirements set forth by this Court, and the magistrate therefore could not, by looking at the four corners of the affidavit, make an informed decision if probable cause existed to issue the warrant. His subsequent issuance of the warrant consequently did not permit a procedure designed to "focus searchingly on the question of obscenity."

The constitutional impossibility of leaving the protection of First Amendment freedoms to the "whims of the officer charged with executing the warrant" has been asserted in *Roaden, supra*, at 505. The two motion picture films at issue herein are arguably protected by the First Amendment. Because of the defective affidavit, however, the seizure of the films brought to an "abrupt halt an orderly and presumptively legitimate distribution or exhibition." *Roaden, supra*, at 504.

Officer Collins testimony at the suppression hearing further indicates that the affidavit made by him was constitutionally defective. The Officer's determination of obscenity clearly could not lead to a search warrant that complied with the Fourth Amendment requirements, since his understanding of the Kentucky obscenity statute was that when viewing the motion picture films, he was to take into consideration what is fit for "children" and in that he included the "serious literary, artistic, political or scientific value" test in his contemporary community standard determination. This Court has said in *Pinkus v. United States*, 436 U.S. 293 (1978) with regard to contemporary community standard:

> ". . . we elect to take this occasion to make clear that children are not to be included for these purposes as part of the community as that term relates to obscene materials . . ." *Id.* at 297.

Children therefore are not included in the determination of whether material is obscene applying contemporary community standards. In addition, Mr. Justice Blackmun, expressing the opinion of the majority in *Smith v. United States*, 431 U.S. 291 (1977) has indicated that "literary, artistic, political, or scientific value" is to be considered without regard to contemporary community standards. To the same effect, see F. Schauer, The Law of Obscenity 123-124 (1976). The resulting seizure of the motion picture films, based upon the insufficient affidavit, rendered the search warrant constitutionally insufficient, in violation of Petitioners First, Fourth, and Fourteenth Amendment rights.

An examination of the search warrant discloses that the police officer, Bruce Collins, viewed the motion picture films seized in the company of Campbell County District Judge, Leonard L. Kopowski, who was also the magistrate signing the search warrant. The search warrant therefore was not signed by a "neutral and detached" magistrate. A constitutional requirement of a valid search warrant is precisely the neutral and detached quality, which a magistrate must have to make a determination of probable cause.

> "A warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than a hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out a crime." *Johnson v. U.S.*, 333 U.S. 10, 14 (1948); *U.S. v. Chadwick*, 433 U.S. 1, 9 (1977).

The magistrate's participation in the investigation which led to Petitioners' conviction, thus resulted in his becoming "a member, if not a leader" of what was "essentially a police operation" and eroded his neutral and detached posture required of a judicial officer. *Lo-Ji Sales, Inc. v. New York*, 422 U.S. 319, 327 (1979).

In essence, the magistrate had acquired personal knowledge and interjected evidentiary disputed facts into the case as a result of his personally viewing the motion picture films seized. He thereby undertook to

> "telescope the processes of the application for a warrant, the issuance of the warrant, and its execution." 422 U.S. at 327.

His personal interjection in the procedure of fact finding renders the seizure of the films unreasonable and the warrant constitutionally defective, since his role as a "neutral and detached" magistrate could no longer be discerned from that of a prosecutor and a police officer. It is well established that "a higher hurdle in the evaluation of reasonableness" is necessitated "where the right of expression is involved." *Roaden, supra* at 503. See also *Speiser v. Randall*, 357 U.S. 513, 525 (1958) and *Marcus v. Search Warrant*, 367 U.S. 717, 730 (1961).

Mr. Justice Goldberg, writing for the majority in *Aguilar v. Texas*, 378 U.S. 108 (1964) said:

> "An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred . . ." 378 U.S. at 110-111.

Indeed, this rule goes to the foundation of the Fourth Amendment. A contrary rule would clearly reduce that amendment to a nullity. *Johnson v. United States*, 333 U.S. 10 (1964).

II.

The Prosecutor's Improper Comments On The Accused's Failure To Testify, His Interjection Of Personal Beliefs, And His Misstatement Of The Burden Of Proof Constitute Prejudicial Error.

At the trial below, during closing argument, the prosecutor made a series of improper and prejudicial comments, the cumulative effect of which vitiated Petitioners' constitutional guarantees under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

First, the prosecutor commented on Petitioners' failure to take the stand as follows:

> "Now, Mr. Plummer would like you to believe that that's a mistake [referring to the corporate name change from one corporation to another], did he bring them in here to say that's a mistake? No." Tr. at 570.

This comment was improper, prejudicial, and violative of Petitioners' Fifth Amendment rights, because of its possible effect on the verdict. This Court has held in *Griffin v. California*, 380 U.S. 609 (1965) in an opinion authored by Mr. Justice Douglas, that the Fifth Amendment forbids comment by the prosecutor on the accused's silence. The comment made by the prosecutor on the Petitioners' failure to testify is not harmless error. This Court has established that the question whether a violation of the *Griffin* rule has constitutes harmless error rather than prejudicial error, is a federal question, and before the error can be declared harmless, it must be so declared beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967), reh. den. 386 U.S. 987. To the same effect see *Fontaine v. California*, 390 U.S. 593 (1968), *reh. den.* 391 U.S. 929. When it cannot be clearly said that an adverse statement did not have a substantial influence on the judgment, the court must set aside the conviction and grant a new trial, because the error cannot be declared harmless beyond a reasonable doubt. *U.S. v. C.L. Guild Constr. Co.*, 193 F. Supp. 268 (D.C.R.I. 1961).

Second, the prosecutor made repeated, persistent references to his personal beliefs:

> "Again, I say to you, you haven't tolerated it, the people who go in that theater, they have sanctioned it, they have saw it but the community, you and I and our families and our friends in the community have not had a chance to judge it." Tr. 566.
>
> "I don't believe that these things, this trash, this garbage, has serious scientific value." Tr. 563.
>
> "Like I said, perhaps there should have been more prosecutions . . ." Tr. 556.

The prosecutor's reference to his personal opinion as to the guilt of the Defendants, vitiated the constitutional guarantee of the confrontation of adverse witnesses. Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 Crim. L. Bull. 293 (1973). In addition, the reference to his personal belief of guilt invaded the province of the jury and ursurped the jurors' function, by injecting irrelevant and inadmissible matter and fact not legally produced. This is further illustrated by the

derogatory comments the prosecutor made about the defense expert witness:

> "So what's her institute all about? It's a clearing house for paid guns. . . . Apparently it's a clearing house for prostitutes, too." Tr. 565.

The objectionable statements and the injection of false issues by the prosecutor show "from the record that the prosecutor was attempting to induce the jury to believe the worst of the appellant." *Jacobs v. Commonwealth*, 551 S.W. 2d 223, 226 (Ky. 1977). The Supreme Court of Kentucky has soundly condemned this variety of prosecutorial misconduct in *Coates v. Commonwealth*, 469 S.W. 2d 346 (1971), indicating that such action deprives a defendant of the fair jury trial to which he is entitled. Convictions should not be obtained by improper methods. *Chapman v. State of California, supra; Berger v. U.S.*, 285 U.S. 78 (1935). It is well established that a prosecutor should not assume the role of a prosecutor and improperly add his personal influence and that of his official position to the probative force of the testimony adduced, because otherwise the verdict arrived at by the jury is not based on the evidence.

Third, the prosecutor misstated the burden of proof to the jury:

> "What is a reasonable doubt? A substantial doubt, a real doubt, a question you should be asking yourself is do I feel they did what the Commonwealth has said they did. . . . So don't get hung up on that thing, reasonable doubt. That's what you should ask in your mind, do I feel they did it." Tr. 578

This prosecutorial misstatement of the law not only lowered the standard of proof making it easier to convict, but also had the practical effect of shifting the burden of going forward with the evidence to Petitioners. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Barnes v. U.S.*, 412 U.S. 837 (1973); *Tot v. U.S.*, 319 U.S. 463 (1943). In *Berger v. U.S.*, 295 U.S. 78-89 (1934), Mr. Justice Sutherland delivering the opinion of the court, has said:

> "Improper insinuations and assertions calculated to mislead the jury, in the argument of the prosecuting attorney . . . are ground for setting aside a conviction, where such misconduct was pronounced and persistent . . ." Hn. 8

Where, as here, the prosecutorial misconduct is pronounced and persistent, it cannot be disregarded as inconsequential, as the substantial rights of the Petitioners have been affected. The prejudicial comments made by the prosecutor are not the "isolated passages" referred to in *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974), but are so frequent and persistent as to have violated Petitioners' right under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

III.

The Commonwealth Of Kentucky Obscenity Statute KRS 531.010 *Et Seq.* Is Unconstitutional As Written And Applied.

First, the Kentucky Obscenity Statute, KRS 531.010 *et seq.* is unconstitutional because of its failure to define contemporary community standards. The fair warning requirement embodied in the due process clause of the Fifth and Fourteenth Amendments prohibits the states from holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed. See *Rose v. Locke*, 423 U.S. 48 (1975) and *Papachristou v. Jacksonville*, 405 U.S. 156 (1972). The criminal Obscenity Statute of Kentucky, KRS 531.010 *et seq.* fails to comply with the fair warning requirement, by virtue of its vagueness and lack of definition. The pertinent definitional portion of the statute provides:

> "(3) Obscene means:
> (a) To the average person, applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to prurient interest in sexual conduct;
> . . ."

The statute thus refers to "contemporary community standards" but does not state whether the applicable standard is state, county or city-wide. Petitioners herein assert that the applicable standard is a statewide standard, and the statute's failure to set forth the same, renders KRS 531.010 *et seq.* constitutionally infirm. This Court has upheld the state

standard as the appropriate standard in *Miller v. California*, 413 U.S. 15 (1973):

> "We hold the requirement that the jury evaluate the material with reference to contemporary community standards of the state . . . is constitutionally adequate." 413 U.S. at 34.

The opinion, written by Mr. Chief Justice Burger, however, warned that too narrow a definition of the referent community could promulgate such a variety of standards that a chilling effect could well be incurred, as distributors would be less likely to know the variable standards in a large number of communities and thus be subject to higher risks of sanction.

In attempting to comply with the requirements of the Miller decision, other states have determined that a statewide community standard is dictated by the Constitution. See *Court v. State*, 63 Wis. 2d 670, 217 N.W. 2d 676 (1974); *People v. Heller*, 22 N.Y. 2d 314, 352 N.Y.S. 2d 601, 307 N.E. 2d 805 (1973); *State v. J-R Distributors*, 82 Wash. 2d 584, 512 P.2d 1049 (1973). The Supreme Court of Colorado, in *People v. Tabron*, 544 P.2d 380 (Colo. 1976) was called upon to determine the contemporary community standard which must be applied in judging obscenity and found that it is a statewide community standard that satisfies the constitutional guarantees:

> "To impose less than a state-wide standard in the interpretation of a state statute would be to denigrate the constitutional guarantees that are afforded to every person." 544 P.2d at 381.

The Supreme Court of Michigan, in *People v. Llewellyn*, 401 Mich. 413, 257 N.W. 2d 902 (1977) has also stated that a statewide community standard is the appropriate one:

> "First, it seems clear that if each locality in the state of Michigan were allowed to establish its own definition of obscenity, a great deal of uncertainty and confusion would be created." 257 N.W. 2d at 907.
>
> ". . . a uniform, statewide system of obscenity regulation provides not only the fairest, but also the most effective means of combating obscenity." 257 N.W. 2d at 908.

To the same effect, see *Berg v. Texas*, 599 S.W. 2d 802 (1980) and *U.S. Manufacturing and Distributing Corporation v. City of*

Great Falls, 546 P.2d 522 (Mont. 1976). Support for the broad definition of "community standards" is also found in an appeal of a recent federal criminal prosecution for obscenity. See *U.S. v. Danley*, 523 F.2d 369, 370 (9th Cir. 1975), *cert. den.* 96 S.Ct. 1143 (1976).

It is true that in *Jenkins v. Georgia*, 418 U.S. 153 (1974) this Court has stated with respect to the appropriateness of jury instructions, that the community standard may remain undefined, or may be defined in more precise geographical terms. However, in *Jenkins* this Court dealt with jury instructions, and a state statute was not at issue. Thus, *Jenkins* is not in apposite to Petitioners' position. In *Hamling v. U.S.*, 418 U.S. 87 (1974) this Court has said that a Court may admit evidence of some place outside a particular district if such evidence "assists the jurors in the resolution of the issues which they were to decide." 418 U.S. at 106. If a juror thus applies the knowledge of the community from which he comes in concluding what decision an "average person, applying contemporary community standards" would reach, and evidence from outside his community is admitted, then a statewide standard, or at the very least a more precise definition than that supplied by KRS 531.010 *et seq.* is mandated. This is especially true in cases such as Petitioners' where the jurors come from different communities. Because of the absence of a statutorily clearly defined community standard, the jurors sitting in the case at bar could not know whether the standard to be applied was that of Campbell County, that of Cincinnati [city across the river] or both, or whether the contemporary community standard was that of the Commonwealth of Kentucky. Petitioners were therefore deprived of their due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Second, the Kentucky Obscenity Statute, KRS 531.010 *et seq.* is unconstitutional, because it fails to comport and comply with the tri-partite *Miller* test. Part (a) of that test provides:

> "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest." 413 U.S. at 24.

Rather than complying with Miller, the Kentucky Obscenity Statute, 531.010(3)(a) superimposes the words "predominant appeal" on the words "taken as a whole". The *Miller* Court, however, specifically mandated:

> "[We] now confine the permissible scope of such regulation to works which depict or describe sexual conduct. . . . A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex. . ." 413 U.S. at 24.

This Court has said that a statute may not be drafted with so broad a sweep as to include in its prohibitions activities which are protected by the First Amendment. *United States v. Robel*, 389 U.S. 258 (1967). If so drawn, a statute will be void even if the conduct actually regulated was not constitutionally protected. *Kunz v. New York*, 340 U.S. 290 (1951). Further, a person subject to the statute

> "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), this Court has set forth the standard for measuring facial invalidity of a statute:

> ". . . the Court has held that a state statute should not be deemed facially invalid, unless it is not readily subject to a narrowing construction by the state courts . . ." 422 U.S. at 216.

In the case at bar, KRS 531.010 *et seq.* is not readily subject to narrowing construction, and it is broader than the standard set forth in *Miller*. An overbroad statute clearly deters from the legitimate exercise of First Amendment rights. In this respect, this Court observed in *NAACP v. Button*, 371 U.S. 415 (1963):

> "The reason for the special rule in first amendment cases is apparent: an overbroad statute might serve to chill protected speech. First amendment interests are fragile interests, and a person who contemplates protected

> activity might be discouraged by the in terrorem effect of the statute." 371 U.S. at 433.

Several state courts have invalidated legislation similarly overbroad. Thus, the Colorado Supreme Court has invalidated Colo. Stat. Sec. 40-7-101(1) which provided:

> "obscene means that which, considered as a whole, predominantly appeals to prurient interest . . ."

in *People v. Tabron*, 544 P.2d 372 (1976). The Court held the statute overly broad because it included activities which could be described or depicted in contexts other than erotic ones, stating: "Where first amendment freedoms are at stake, precision in drafting and clarity of purpose are priority considerations." 544 P.2d at 379. In *Leech v. American Booksellers Ass'n., Inc.*, 582 S.W. 2d 738 (1979), the Supreme Court of Tennessee invalidated a provision of the Tennessee Obscenity Act of 1978 which defined "prurient interest" because the same encompassed qualities and characteristics exceeding the concept of "prurient interest" as the term was defined in *Miller*.

The boundary line between portrayals of sex protected by the First Amendment and unprotected obscene material is marked by the presence of "appeal to prurient interest in sex" and the work must be taken as a whole as set forth in *Miller*, rather than have definitions attached to it which exceed the confines of *Miller*. KRS 531.010 *et seq.* clearly exceeds the confines of the *Miller* guidelines, because it superimposes the additional language of "predominant appeal."

While the superimposition of the words "predominant appeal" renders KRS 531.010 *et seq.* overinclusive, its very overbreadth also renders it vague. See *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Erznoznik*, *supra*, where this Court has held state statutes unconstitutional for vagueness and overbreadth. Mr. Justice Black, concurring and dissenting in *Barenblatt v. U.S.*, 360 U.S. 109 (1959) focused on the vagueness problem in criminal statutes in these words:

> "It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in non-criminal statutes. This is simply because it would be unthinkable

to convict a man for violating a law he could not understand . . . the vice of vagueness is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved." 360 U.S. at 137.

Petitioners herein also attack the constitutionality of KRS 506.080 (Criminal facilitation) and 502.020 (Liability for conduct of another–complicity) on the ground of vagueness, under which they were charged. These statutes do not define the type of conduct that is proscribed and by their terms encompass any and all acts which may provide the means of opportunity for another crime. These statutes essentially provide different penalties for the same offense and a man of common intelligence therefore would not know to which statute he is to conform his conduct. For the reasons set forth above, KRS 531.010 *et seq.* and KRS 506.080 and 502.020 are vague and overbroad, and in violation of Petitioners' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

IV.

Petitioners' First and Fourteenth Amendment Rights Were Violated When The Trial Court Substituted For Petitioners' Jury Instructions Of "Tolerance" In Determining Contemporary Community Standards, The Much Narrower Standard Of "Acceptance".

At the trial below, the Court instructed the jury that in determining the contemporary community standard, the jury is to consider whether the motion picture films at issue are "accepted" in the community, rather than instructing them that they are to apply the standard of "tolerance". The erroneous instruction resulted in unconstitutionally restricting the protection afforded by the United States Constitution. While state courts may expand constitutional protection even where state and federal constitutions contain similar or identical provisions, the states may not restrict this protection. *Miller v. California*, 413 U.S. 15 (1973).

In a relatively recent decision, the Supreme Court of Tennessee in *Leech v. American Booksellers Assoc., Inc., supra*, has interpreted the tolerance test set forth by *Miller* and its progeny in the following terms:

> "It is obvious that the acceptance test would lead to the indiscriminate branding as obscene much of protected speech that would otherwise pass the tolerance test. As we have heretofore noted, we cannot encroach further upon the freedom of speech and press that the Miller standard permit, as a matter of federal constitutional law." 582 S.W. 2d 738, 748.

The most significant cases since the *Miller* decision are *Hamling v. United States*, 418 U.S. 87 (1974); *Smith v. United States*, 431 U.S. 291 (1977). These cases make it clear that state courts may not encroach beyond the constitutional safeguards set by this Court in restricting speech and press or by expanding the standards for adjudicating obscenity *vel non*.

In this respect, Mr. Chief Justice Burger, writing for the majority of the Court observed, in *Miller v. California:*

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." (Emphasis added) 413 U.S. 15, 32.

In discussing the theme that obscenity is to be judged according to the average person in the community, this Court has stated in *Pinkus v. United States*, 436 U.S. 293 (1978).

> "The Court has held . . . local rather than national standards should be applied. *Hamling v. U.S., supra.* Similarly, obscenity is to be judged according to the average person in the community, rather than the most prudish or the most *tolerant*. . . ." (Emphasis added) *Id.* at 299.

Here again, this Court has referred to the "toleration" standard, and not to the "acceptability" of the material. The question to be resolved therefore, is whether the materials are tolerated, and not whether they are acceptable, since that which

is tolerated is of much wider scope than that which is acceptable by any given average person. It is clear that *Miller* and its progeny, in the context of a conviction in state court, refers to that which is constitutionally "tolerated" within the boundaries of a political entity by the average person, and not that which is "acceptable" within the impermissibility narrower confines.

Clearly, the multiple references by this Court in *Miller* and its progeny to the words "tolerable," "tolerant," and "toleration" refer to a community standard of "tolerating" beliefs and behaviors of others within a specific political entity, rather than to a standard of "acceptance" which is by definition equated with personal approval.

The "tolerance" test is set forth in *Smith v. United States*, 431 U.S. 291, at 305 (1977) where this Court, in the course of its discussion of prurient interest and patent offensiveness observes:

> "[C]ontemporary community standards must be applied by juries in accordance with their own understanding of *tolerance* of the average person in their community . . ." (Emphasis added)

In light of the foregoing, the jury instructions of "acceptance" rather than "tolerance" were clearly erroneous, in that they impermissibly narrowed the constitutional mandates set forth by this Court, and Petitioners convictions must therefore be reversed.

V.

Petitioners' Rights To Disseminate Materials Protected By The First And Fourteenth Amendments To The Constitution Of The United States Were Impermissibly Chilled By The Trial Court's Instruction Of "Pandering" Because No Evidence Of "Pandering" Was Adduced At Trial.

At the trial below, the government offered no evidence of pandering of the motion picture films at issue. In fact, the evidence clearly showed that the films were not thrust upon the unsuspecting public, and that they were not advertised in

a provocative manner such as would justify "pandering" instructions. It is well established that there must be sufficient evidence to allow "pandering" instructions according to *Ginzburg v. U.S.*, 383 U.S. 463 (1966), *reh. den.* 384 U.S. 934; *Splawn v. California*, 431 U.S. 595 (1977), and *Pinkus v. U.S.*, 436 U.S. 293 (1978). Indeed, in the Ginzburg case, the evidence clearly established that appellant's materials were created, solicited, advertised, and pandered on their appeal to prurient interest. The appellant publisher was found to have deliberately emphasized the sexually provocative aspects of the material through his advertisements and circulars. Justice Brennan, speaking for the majority, assumed that the material in the abstract could not have been ruled obscene, but he found a violation of the statute when the publications were viewed "against a background of commercial exploitation of erotica solely for the sake of prurient appeal," *supra* at 466. As evidence of this background, he pointed to the fact that the appellant had sought mailing privileges from post offices in Blue Ball and Intercourse, Pennsylvania. Thus, *scienter* was established by the appellant's purposeful and deliberate emphasis in advertising material that would appeal to prurient interest; therefore, it was in effect a proclamation on his part that the material was obscene. It is significant to note that the appellant's marketing technique by virtue of the fact that it was in and of itself "pandering" was significant in the Court's determination that the appellant had actual knowledge of the explicit nature of the material.

While it is true that the jury may consider whether a particular publication or movie has been pandered, it may only do so where sufficient evidence thereof has been adduced at trial. This Court clearly did not intend the sort of pandering found significant in *Ginzburg* to include the mere exhibition of motion picture films in an adult bookstore, in the absence of scienter by Petitioners. The importance of the sufficiency of evidence to support a charge of "pandering" has been set forth in *Pinkus v. U.S.*, 436 U.S. 293 (1978), where Mr. Chief Justice Burger, writing for the majority of the Court, expressed the following opinion:

> "*Nothing prevents a court from giving an instruction* on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person *when the evidence, as here, would support such a charge.* *See Hamling v. United States, supra.* Many of the exhibits depicted aberrant sexual activities. These depictions were generally provided along with or as part of the materials which apparently were thought likely to appeal to the prurient interest in sex of nondeviant persons. One of the mailings even provided a list of deviant sexual groups which the recipient was asked to mark to indicate interest in receiving the type of material thought appealing to that particular group." (Citations omitted) (Emphasis added) 436 U.S. 293, 302.

The opinion further delineated the circumstances under which instructions as to "pandering" were justified, in the following words:

> "Pandering is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. *Ginzburg v. United States, supra; Roth v. United States, supra,* reaffirmed that to aid a jury in its determination of whether materials are obscene, the methods of their creation, promotion, or dissemination are relevant. *Splawn v. California; Hamling v. United States.* In essence, the Court has considered motivation relevant to the ultimate evaluation *if the prosecution offers evidence of motivation.*" (Citations omitted) (Emphasis (added) 436 U.S. 293, 303.

It is clear that the pictorial representations contained in the motion picture films at issue hardly qualify for "pandering" instructions since no evidence of methods of production, editorial goals or of motivation was offered by the prosecution, nor was there any showing that the material at issue here appealed to the prurient interest of a deviant group such as the evidence shows in *Pinkus v. United States, supra.* The evidence in the case at bar showed that no abberant sexual behavior was depicted, and therefore, and for all the other reasons cited hereinabove, the evidence was *not* "sufficient to trigger the *Ginzburg* pandering instruction." 436 U.S. 293, 304.

VI.

Evidence Which Shows That Petitioners Neither Knew The Nature, Nor The Character And Contents Of The Sexually Explicit Materials Exhibited Is Constitutionally Insufficient To Support A Conviction On The Issue Of *Scienter.*

The evidence at trial below disclosed that Petitioner Pauline Mullins was not in the Cinema X Theatre when the movies at issue herein were exhibited. The evidence further showed that she had no actual knowledge of the nature, character and contents of the motion picture films exhibited. Her conviction was thus obtained by relying on a "constructive knowledge" standard which is constitutionally insufficient to support a conviction. The seriousness of this question is well demonstrated by the fact that *certiorari* has been granted on this precise issue in *Ballew v. Georgia*, No. 76-761, question number 2, *certiorari* granted January 25, 1977. The *Ballew* case was decided on other grounds, however, and this Court therefore did not reach the issue of "constructive knowledge". See *Ballew v. Georgia*, 435 U.S. 223 (1978) (*Ballew I*), decided March 21, 1978. In *Ballew v. Georgia*, 436 U.S. 962 (1978) (*Ballew II*), the dissent by Justices Brennan, Stewart, and Marshall indicates that these Justices would have granted *certiorari* on the *scienter* issue in the following words:

> "I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted it in *Ballew I*. For this reason, I would grant certiorari."

Furthermore, the dissenting opinions by Justices Brennan, Marshall, and Stewart in *Sewell v. Georgia*, 435 U.S. 982 (1978) and in *Teal v. Georgia*, 435 U.S. 989 (1978), both decided April 24, 1978, indicate that from a constitutional standpoint, jury instructions permitting a basing of *scienter* on "constructive knowledge" are impermissible under the Constitution of the United States.

Petitioners contend that predicating a conviction upon a finding of "constructive knowledge" is constitutionally impermissible under *Hamling v. United States*, 418 U.S. 87 (1974), where this Court enunciated the constitutional minimum standard of *scienter* as follows:

> "We think the 'knowingly' language of 18 U.S.C. § 1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the 'prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials.' " 418 U.S. at 123 (Emphasis added).

Consistent with the above statement from *Hamling*, Petitioners contend that the prosecution must show that they "had" knowledge rather than that they "should have had" knowledge of the content, character and nature of the materials with which they were charged. In addition, it is submitted that the dissenting opinions by three United States Supreme Court Justices, namely Justices Brennan, Marshall, and Stewart in *Teal*, and *Sewell*, *supra*, amply demonstrate the substantiality of the question. Indeed, Justice Brennan, with whom Justice Marshall joined, dissenting, states:

> "In *Ballew v. Georgia*, 435 U.S. [223] (1978), we granted certiorari to consider, but did not reach, the precise *scienter* issue now raised by appellant . . . I see no basis for concluding that a federal constitutional question sufficiently substantial to be granted review on certiorari is now so insubstantial to require exercise of our mandatory appellate jurisdiction in this case." *Sewell*, *supra*.

The United States Supreme Court's dismissal of the appeals in *Teal*, *Sewell*, and *Ballew II* thus clearly did not go to the merits of the *scienter* arguments, especially in light of the recognition by Justices Brennan, Marshall, and Stewart of the importance of the question raised and the desirability of having various aspects of those issues further illuminated.

Petitioners submit that the instruction on *scienter*, as given by the trial Court, failed to meet the constitutional minimum standards of *scienter* set forth by this Court in *Hamling*, *supra*.

As the Court is aware, the principles governing the issue of *scienter* in the area of *First Amendment* litigation originates with the decision in *Roth v. United States*, 354 U.S. 476 (1957).

In deciding *Roth v. United States, supra*, the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. See, *e.g.*, *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947); *United States v. Harris*, 347 U.S. 612, 624 n. 15 (1954); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); *United States v. Ragen*, 314 U.S. 513, 523-524 (1942); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497 (1925).

The constitutional validity of the obscenity statutes involved in *Roth* rested therefore, in significant measure upon the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material distributed was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California*, 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which were not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S. at 511.

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the state with respect to the "stringent *scienter* requirement" and "vital element of *scienter*," 383 U.S. at 507, 510 n. 5, the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter." 383 U.S. at 510 n. 9.

Hamling, supra, sets forth that the prosecution must show that a defendant "had" knowledge of the content, character, and nature of the materials with which he is charged and that the jury must be thusly instructed. To hold otherwise would permit conviction solely on the basis of guesses and assumptions of police officers that a particular movie is obscene. To this effect, it is stated in the dissent in *Sewell, supra:*

> ". . . the constructive *scienter* requirement of § 26-2101(a), at least as applied in appellant's trial, provides no reasonable assurance that persons will know or ought to know when they are likely to violate § 26-2101(c)." *Sewell,* at 5.

The Justices thus recognize the impermissible chilling effect produced by the constructive knowledge instructions given in Petitioners' case. It is Petitioners' contention that when instructions of "constructive knowledge" are given, every purveyor of presumptively protected *First Amendment* material is at the mercy of an unpredictable jury determination that some facet of the title or cover of the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it.

Petitioners do not contend that they can escape criminal liability by refusing to review the films they exhibit. If this were the case, some might refuse to review the material precisely because they "know" what they will find. In a very real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal.

What Petitioners do contend, is that they cannot be convicted in the absence of proof of what they actually knew, whether this actual knowledge is proved by circumstantial

evidence or otherwise. The Petitioners were convicted upon constructive knowledge which imposes a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such an inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith v. California*, 361 U.S. 147 (1959).

In the case at bar, neither the record evidence nor the jury instructions on the issue of *scienter* could reasonably support a finding of guilty beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307 (1979) which sets forth the test for the sufficiency of the evidence. For all the reasons set forth above, Petitioners' convictions must be reversed.

VII.

The Materials Charged Against Petitioners Constitute Protected Expression Under The First And Fourteenth Amendments To The Constitution Of The United States Because They Are Not Obscene As A Matter Of Law.

This Court is respectfully requested to independently review the alleged obscenity of the motion picture films "Getting Off" and "Painful Desires" constituting the basis of Petitioners' conviction.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S. 478 at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

"Whether this question (of obscenity) be deemed one of fact or of mixed fact and law, see *Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S. 478 at 488.

The Court decided that the determination of that issue must ultimately rest with it:

"That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc. v. Christenberry*, (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by the Supreme Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio, motion picture theater operator for possessing and exhibiting the film "The Lovers." On appeal, the Court, reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, stated:

"Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicated an issue of constitutional law. See *Roth v. United States, supra*, 354 U.S. at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 488, 1 L.Ed.2d at 1514; See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S. at 188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since

the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge". The Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This Court is respectfully requested to perform the judicial duty above delineated, and thus to determine the obscenity *vel non* of the films here upon which Petitioners' convictions rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect, it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, bestiality, oral-genital intercourse, sadomasochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts*, 383 U.S. 413 (1966), ("Fanny Hill"), *Aday v. United States*, 388 U.S. 477 (1967), ("Sex Life of A Cop" described at 357 F.2d 855), *Corinth Publications v. Westberry*, 388 U.S. 488 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio*, 388 U.S. 453 (1967) ("Orgy Club") *Hoyt v. Minnesota*, 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women, films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian activity and heterosexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of finding of obscenity as to a "stag film depicting a nude woman

masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), affirmed *sub nom. Pinkus v. California*, 400 U.S. 922 (1970).

An item of explicitness similar to that in the films here was before this Court in *Jenkins v. Georgia*, 418 U.S. 153 (1974). In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Supreme Court noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, however, noting:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id.* at 161.

The material presently before this Court is similar to that involved in the *Jenkins* decision. Whether or not the Court might find this material to be "soft core" pornography, it is clearly not "hard core" pornography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction. The Court quoted from *Miller* to the effect that:

> "No one (may be constitutionally prosecuted) for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core'* sexual conduct." 418 U.S. 153 at 160 quoting 413 U.S. 1 at 25.

The Court thus went on to reverse the conviction since the film "Carnal Knowledge" was simply not a "public portrayal" of *hard core* sexual conduct. 418 U.S. 153 at 161.

The motion picture films at issue are simply not *hard core* sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that it constitutes protected speech under the *First* and *Fourteenth Amendments* of the *United States Constitution*, and cannot possibly constitute hard core sexual material. Petitioners' convictions must, therefore, be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the denial of discretionary review by the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF KENTUCKY
82-SC-102-D
(81-CA-2518-D)

HAPPY DAY, INC., BROWN BEAR, INC., AND PAULINE MULLINS,
Movants,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

Campbell Circuit Court
81-X-31

ORDER DENYING DISCRETIONARY REVIEW

The motion of Happy Day, Inc., Brown Bear, Inc., and Pauline Mullins for a review of the decision of the Court of Appeals is denied.

ENTERED: April 13, 1982

/s/ _____
Chief Justice

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 81-CA-2518-D

HAPPY DAY, INC., BROWN BEAR, INC., AND PAULINE MULLINS,
Movants,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Motion For Discretionary Review
From Campbell Circuit Court
No. 81-X-31

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: VANCE, LESTER, and REYNOLDS, JUDGES

The Court, having considered the motion for discretionary review, and being otherwise sufficiently advised, ORDERS that it be, and is hereby, DENIED.

ENTERED: January 27, 1982.

/s/

Judge, Court of Appeals

APPENDIX C

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE
No. 81-X-31
(Cinema X No. 1)

HAPPY DAY, INC., BROWN BEAR, INC.,
AND PAULINE MULLINS,
Appellants,

v.

COMMONWEALTH OF KENTUCKY,
Appellee.

Filed November 16, 1981

ORDERS AND JUDGMENT

This matter is before the Court upon appeal by Happy Day, Inc., Brown Bear, Inc. and Pauline Mullins from the final judgment entered by the District Court on July 10th, 1980. Each of the appellants was found guilty by a Jury verdict and Judgment of the District Court. Two of the appellants are corporations and the third appellant, Pauline Mullins, is on bond.

The appellants have raised a number of points relating to constitutional law violations and various errors in the trial conducted in the District Court. The constitutional questions include the constitutionality of KRS 506.080 (Criminal Facilitation), 531.010 and 531.020. Appellants further contend that there constitutional rights were violated in respect to the First, Sixth and Fourteenth Amendments to the U.S. Constitution and Sections Ten and Eleven of the Kentucky Constitution.

Further, appellants urge error in the denial of their motion for judgment notwithstanding the verdict, improper argument by the Commonwealth in its closing argument, in allowing

evidence of former convictions of misdemeanors and in instructing the Jury, inter alia.

Having reviewed the entire record herein this Court finds that there has been no abridgement of any of the constitutional rights of the appellants; that the Kentucky Statutes under attack are constitutional and valid; and that there was no reversible errors committed at the trial in the District Court in the procedures and disposition of the subject appeal.

Accordingly, the Judgment of the District Court is hereby affirmed, the appeal herein is dismissed and the sentence of the District Court may be carried out.

So ORDERED AND ADJUDGED this 16th day of November 1981.

/s/

John A. Diskin, Judge

CERTIFICATION:

This is to certify that a true copy of the foregoing Orders and Judgment was this 16th day of November, 1981 mailed to Mott V. Plummer, Robert Eugene Smith, Stephen C. Megerle, Arthur M. Schwartz, Justin D. Verst, William Wehr and Hon. Timothy Nolan.

Edward D. Blau, Clerk

By /s/ _____ D.C.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or the press . . ."

2. The pertinent provisions of the Fourth Amendment are:

   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be seized, and the persons or things to be seized."

3. The pertinent provisions of the Fifth Amendment are:

   No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

4. The pertinent provisions of the Sixth Amendment are:

   "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

5. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

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No. 81-2272

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PAULINE MULLINS, HAPPY DAY, INC.,
and
BROWN BEAR, INC., - - - - - Petitioners,
versus
COMMONWEALTH OF KENTUCKY, - Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Should Certiorari be denied when none of the considerations governing review are present?

2. Sufficiency of the search warrant.

3. Alleged prosecutorial misconduct.

4. Constitutionality of the Commonwealth of Kentucky obscenity statute K.R.S. 531.010 et seq. as written and applied.

5. Rejection of "tolerance" standard in jury instructions for determining contemporary community standards.

6. Allegation that petitioner's rights to disseminate materials were impermissibly chilled.

7. "General" versus "specific" knowledge of the nature, character, and content of the sexually explicit materials in question.

8. Obscenity as a matter of law.

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IN THE

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October Term, 1981

No. 81-2272

PAULINE MULLINS, HAPPY DAY, INC.,
and
BROWN BEAR, INC., - - - - *Petitioners,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent,*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

The Respondent respectfully prays that the Petitioners' Petition for a Writ of Certiorari be denied.

OPINION BELOW
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above, with appendixes, have been presented by the Petitioners to the satisfaction of the Respondent. Furthermore, all parties to the proceedings in the Kentucky courts are listed in the caption.

STATEMENT OF THE CASE

Again, pursuant to Rule 34.2, the Respondent takes issue with only the portions of Petitioners' statement of the case as to be addressed herein.

At the suppression hearing held herein, the Commonwealth made a continuing objection to the questioning of Officer Collins relative to his interpretation of the Kentucky obscenity statutes. Although the court allowed said questioning for the limited purpose of that hearing, it is clear that the only relevant issue was the determination of probable cause made by the issuing magistrate. The motion to suppress was overruled.

At the trial below, the testimony disclosed that Pauline Mullins was the only employee found on duty and inside the establishment known as the Cinema X Theatre at the time of the execution of the search warrant. It further disclosed that one of the two films seized and later found obscene was being shown at that same time. As stated by Petitioners, the charge as to Pauline Mullins was amended with leave of the court to Criminal Facilitation at Distribution of Obscene Matter.

As to the other Petitioners at the trial below the evidence disclosed that Brown Bear, Inc. not only owned the Cinema X building, but also that it continued to provide Workman's Compensation coverage for Cinema X employees and had the same sole office holder as Happy Day, Inc. Happy Day, Inc. was stipulated to being the license holder for the Cinema X Theatre,

filed payroll reports for that entity, and was controlled by the same family as Brown Bear, Inc.

REASONS FOR DENYING WRIT

I.

None of the Considerations Listed in Rule 17 Are Applicable in the Case at Bar.

Although obviously not controlling, Rule 17 of the Rules of this Court indicates the character of reasons that will be considered in a petition for writ of certiorari. Since the Kentucky Courts have accepted and followed the applicable federal law, as will be shown herein, the petition should be denied.

II.

A Search Warrant Based Upon a Sufficient Affidavit and Based Upon a Review of the Sexually Explicit Materials by an Impartial Magistrate is Constitutionally Sufficient.

There is no basis to the petitioners' arguments that the trial court erred in overruling their motion to suppress. The seizure of the two motion pictures involved herein was not accomplished in violation of the Fourth Amendment to the U. S. Constitution, nor in violation of the Kentucky Constitution, and the seizure in question followed the specific dictates of Kentucky and federal case decisions.

A warrant, issued by a judge after reviewing allegedly obscene films, is one permissible way to evaluate the probable cause for the issuance of a search

warrant and the seizure of the films alleged to be obscene. *Crecelius* v. *Commonwealth*, Ky. 502 S. W. 2d 89 (1973), and *Western Corporation* v. *Commonwealth*, Ky., 558 S. W. 2d 605 (1977), and *Heller* v. *New York*, 413 U. S. 483 (1973), and *Roaden* v. *Kentucky*, 413 U. S. 496 (1973).

In addition, a search warrant issued by a judge based upon an affidavit of a police officer who has viewed the films alleged to be obscene, is also a proper way to establish the probable cause necessary for the issuance of the search warrant and the seizure of the films.

Either of the above two procedures can form the proper basis to establish probable cause and issue a search warrant for the seizure of allegedly obscene material. In the case at hand, the search warrant was issued based upon the probable cause established through examination of the affidavit of a police officer and also based upon the magistrate's own personal viewing of the films in question.

In *Heller* v. *New York, supra*, the U. S. Supreme Court went into great detail in laying out their requirements for the seizure of motion picture films and established guidelines that were specifically followed in the case at hand. In the case at hand, the magistrate, Judge Kopowski, had not in any way become a "member" or "leader" of the police operation as such was prohibited under the case of *Lo-Ji Sales, Inc.* v. *New York*, 422 U. S. 319, 327 (1979). The only connection the magistrate in the within case had with the matter was to view the films and sign the search war-

rant after his viewing of the films and after reviewing the affidavit of the police officer. He in no way participated in the investigation or the operation as was done in the *Lo-Ji Sales* case. Additionally, it should be pointed out that the magistrate who issued the search warrant was not the trial judge and therefore, there was no interjection of evidentiary disputed facts into the trial of the case as alleged by the petitioners.

III.

The Commonwealth's Closing Argument Was Proper and Did Not Constitute Prejudicial Error.

There was not, during closing arguments, improper comments that in any way vitiated the petitioners' constitutional protections.

An advocate may refer to any matters in evidence and may suggest any inferences which may fairly be drawn from the evidence. An advocate may be given reasonable latitude in arguing the implications of the evidence. *Richards* v. *Commonwealth,* Ky., 517 S. W. 2d 237 (1975); *Koonce* v. *Commonwealth,* Ky., 452 S. W. 2d 822 (1970). Indeed, it is error for the court to restrict the right of advocate to make comment on the evidence. *Woodford* v. *Commonwealth,* Ky., 376 S. W. 2d 526 (1964).

Further, whenever a jury is authorized to set the punishment for an offense, an advocate may refer to any relevant matters before the jury in support of any punishment authorized by law and strong appeals for severe punishment because of the gravity of the offense

or class of offenses are proper. *Harness* v. *Commonwealth,* Ky., 475 S. W. 2d 485 (1972); *Hamilton* v. *Commonwealth,* Ky., 401 S. W. 2d 80 (1966).

Furthermore, although an advocate may not introduce improper matters into the closing arguments initially, he may refer to otherwise improper matters in the course of reasonable retaliation based upon matters introduced by his adversary. *Meyer* v. *Commonwealth,* Ky., 472 S. W. 2d 479 (1971); *Hunt* v. *Commonwealth,* Ky., 466 S. W. 2d 957 (1971); *White* v. *Commonwealth,* Ky., 394 S. W. 2d 770 (1965).

In the case at hand, a review of the entire record will indicate that the arguments of the Commonwealth were proper within the purview of the authority cited above and the court did not err in refusing to grant the defendants a mistrial.

As to the petitioners' assertion that the prosecutor commented on petitioners' failure to take the stand, a review of the transcript will show that the statement "did he (Mr. Plummer) bring them in here to say that's a mistake", the "them" referred to is not even the petitioners, but rather the telephone records or someone from the telephone company concerning those records. Such was proper rebuttal to the "testimony" of Mr. Plummer in his closing argument about the lack of a corporate change of name from Brown Bear, Inc. to Happy Day, Inc. on the telephone records being a mistake when there was no such testimony on behalf of the defendants. There was no comment whatsoever concerning the petitioners not taking the stand.

The comments of the Commonwealth concerning the lack of enough prior prosecution and the lack of community tolerance as to the films shown at the Cinema X were proper in response to defense counsel's arguments that innumerable similar films had been shown at the Cinema X during the nine years prior to the case at hand and that since there was only one prior prosecution, there must not have been anything wrong with all the other films.

The Commonwealth's argument concerning the lack of credentials and credibility of one of the defense expert witnesses and her institute for the advancement of human sexuality was proper comment, based upon the testimony in the case as to the experts from said institute having testified on numerous occasions for the defense in pornography trials and as to the testimony concerning the institute providing surrogate partners to their clientele as part of their business.

The Commonwealth's arguments concerning reasonable doubt were proper in rebuttal to the arguments of defense counsel that there were reasonable doubts as to all the petitioners.

Thus, it can be seen under the authority noted above and considering the circumstances in which the arguments in question were made, there was no improper argument in violation of constitutional rights by the Commonwealth in its closing argument that would constitute reversible error. However, if there were any improper comments on behalf of the Commonwealth, said comments certainly constituted harmless error in light of the overwhelming evidence as to the obscenity

of the films in question and the guilt of all the petitioners.

IV.

The Commonwealth of Kentucky Obscenity Statute, KRS 531.010, Et Seq. Is Constitutional as Written and Applied.

The petitioners have raised various issues relating to the constitutionality of Kentucky Revised Statute 531.010, et seq. and Kentucky Revised Statute 506.080 as written and as interpreted and applied by the trial court.

In response to movants' arguments, the Kentucky pornography law, KRS 531.010, et seq. is not unconstitutional as written or applied in the case at hand nor does it fail to conform to the minimum standards set forth in *Miller* v. *California*. Kentucky's pornography law was specifically revised in 1974 to comply with the Supreme Court's mandate in *Miller* v. *California*, 415 U. S. 15 (1973).

Miller held:

> "The basic guidelines must be: (a) whether the average person applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value." *Miller, supra*, 413 U. S. at p. 24. Under part (b) of the

test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The court in *Miller* offered examples of what a state might constitutionally choose to regulate: (1. patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.) (2. patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.) *Miller, supra,* 413 U. S. at 25.

KRS 531.010 (section 3) states:

Obscene means:

(a) to the average person applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to the prurient interest in sexual conduct, and

(b) the matter depicts or described the sexual conduct in a patently offensive way; and

(c) the matter, taken as a whole, lacks serious litrary, artistic, political, or scientific value.

(d) sexual conduct means acts of masturbation, homosexuality, lesbianism, beastiality, sexual intercourse, or deviant sexual intercourse, or physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification.

Pursuant to the guidelines of the *Miller* case, it is not necessary to define geographical community and it is not necessary to define prurient interest. The only definition required by *Miller* is that of sexual conduct.

The Kentucky pornography law, KRS 531.010(4), complies with that requirement. *Miller* held that the "state at large" is a constitutionally adequate standard as to a geographical community. The trial court properly ruled that the geographical community could and should be further limited to the geographical community of Campbell County, Kentucky. In the case of *Hambling* v. *United States,* 418 U. S. 87 (1974), in discussing the issue of geographical community, the court stated as follows:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding which conclusion the average person, applying contemporary community standards would reach in any given case. Since this case was tried in the southern district of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that community upon which jurors would draw." *Hambling, supra,* at p. 101.

In the case at hand, in that the jurors who were to hear the case were by state law mandated to reside in the community of Campbell County, Kentucky, the trial court properly ruled that the geographical community whose standards were to be considered, was the community of Campbell County, Kentucky, where the jurors came from.

Furthermore, it is not necessary to define the specific illegal acts that are prohibited under KRS 531.010, et seq. These acts are not of a technical nature, and, therefore, are understandable by a reasonable person without further defining them. See *Gateway Construction Co.* v. *Wallbaum,* 356 S. W. 2d 247 (1961). Certainly, a reasonable person with common intelligence can understand what it means to prepare, publish, print, exhibit, distribute and offer or possess with intent to distribute obscene material.

The application of the statute in question does not reach activities which are absolutely protected by the First and Fourteenth Amendments. Obscene material is unprotected by the First and Fourteenth Amendments pursuant to the *Miller* case. Therefore, the activities which fall under the Commonwealth's pornography laws, KRS 531.010, et seq., are not protected by the First and Fourteenth Amendments based upon their being obscene. KRS 531.010 is in complete compliance with the Supreme Court guidelines and dictates as set out in the *Miller* case. There was, and is, no need for the courts of the Commonwealth of Kentucky to "authoritatively construe" Kentucky's obscenity law as suggested in the *Miller* case in that the Commonwealth's pornography law was specifically revised in 1974 to comply with the mandates of the *Miller* case. The authoritative construction suggested in the *Miller* case was merely an alternative to any actual revision of the state's pornography laws.

V.

Tolerance, Is Not the Standard To Be Applied In Determining Contemporary Community Standards.

First of all, it should be pointed out that the trial court did not instruct the jury that in determining the contemporary community standard the jury was to consider whether the motion picture films at issue were "accepted" in the community. The facts of the case will indicate that the court did refuse to instruct the jury that the standard to be applied was one of "tolerance".

KRS 531.010(3)(a) defines obscene as meaning "to the average person, applying contemporary community standards, the predominant appeal of the matter taken as a whole, is to prurient interest in sexual conduct." Said language, passed by the Kentucky Legislature pursuant to the requirements of *Miller* v. *California, supra,* makes no reference whatsoever to the test of obscenity being whether the average person has in the past, is in the present, or will in the future, tolerate the type of matter being depicted. By way of analogy, the petitioners' argument at the trial level and on appeal that if the distribution of certain matter has been tolerated, it must not be a crime, would be analogous to an argument that since various violent crimes occur in the community, they have been tolerated and are, therefore, not crimes.

Just as the word "tolerance" has been used by the Supreme Court in its decision, so has the word "accept." Mr. Chief Justice Berger, writing for the

majority of the court, observed in *Miller* v. *California, supra,* "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine and Mississippi 'accept' public depiction of conduct found tolerable in Las Vegas or New York City." No where in *Miller* v. *California,* or progenies, is there any requirement that a tolerance instruction be given and the trial court did not abuse its discretion in denying such a tolerance instruction.

VI.

The Jury Instructions as Given Did Not Impermissibly Chill the Petitioners' Rights to Disseminate Materials.

First of all, it should again be pointed out that the films and establishment in question did advertise and portray the material being shown in a manner such as would justify a "pandering" instruction. The evidence produced at trial showed that the names of the films, "Getting Off" and "Painful Desires" were intended to appeal to the prurient interest, the Cinema X Theatre had posted statements or advertisements to the effect that "we show all four star movies", "if sexually exploitation offends you, do not enter", and that the "films shown are sexually explicit".

The jury instruction in question did make reference to circumstances of dissemination of the material and said instruction was proper under *Gindsburg* v. *U. S.,* 383 U. S. 463 (1966), *Splayn* v. *California,* 431 U. S. 595 (1977) and *Pinkus* v. *U. S.,* 436 U. S. 293 (1978).

VII.

Only General, Not Specific, Scienter as to the Nature, Character, and Content of the Sexually Explicit Materials Must Be Shown.

The petitioners have alleged that their conviction was obtained by relying on a "constructive" knowledge standard which they claim was constitutionally insufficient to support a conviction.

It should first be pointed out that there was not any jury instruction whatsoever that would permit the jury to convict based upon constructive knowledge rather than actual knowledge.

The instruction actually given was to the effect that a person had the requisite knowledge of content and character when he or she was aware that the film showed or depicted explicit sexual conduct whether or not such person had precise knowledge of the specific contents of the film. Kentucky Revised Statute 531.020 (1) makes no mention whatsoever of specific knowledge but merely states that "a person is guilty of distributing of obscene matter when, having knowledge of its content or character, he . . ."

As previously mentioned in the statement of the case, as to all the petitioners, there was an abundance of proof through various sources and means as to the extensive intermingling and knowledge by all of the petitioners of the nature, content and character of the type of material that was being shown at the Cinema X Theatre. The court properly instructed the jury that "knowledge, content and character" means having

general knowledge of the nature, content and character of the material. A person has such knowledge when he or she is aware that the film shows or depicts explicit sexual conduct whether or not such person has precise knowledge of the specific contents of the films. Such knowledge may be proven by direct or circumstantial evidence, or both. *Hambling* v. *United States,* 418 U. S. 87, 119-20 (1974); *United States* v. *Orioto,* 413 U. S. 139 (1973); *U. S.* v. *Thedis,* 484 F. 2d 1149, 1153 (5th Cir. 1973); *U. S.* v. *Hill,* 500 F. 2d 733, 740 (5th Cir. 1974).

It would be an absurd result if defendants such as the within petitioners could escape prosecution and responsibility for the distribution of obscene matter as long as they could show that they had not seen the specific films in question and, therefore, did not know the nature nor the character and contents of the sexually explict material that was being exhibited. The type and amount of scienter argued for by the petitioners would allow for such an absurd result.

VIII.

The Motion Picture Films "Getting Off" and "Painful Desires" Are Obscene and Therefore Excluded From Constitutional Protection.

Simply put, the Petitioners' final argument is that this Court should review the two films in issue and find that they are not obscene as a matter of law. Although the Respondent would encourage this honorable court to review the films to see how preposterous their argu-

ment is, the previous holdings of this court do not require such a review.

Petitioners have cited only three opinions from this court dealing with motion pictures in support of their argument, and all were either decided or dealt with a trial which took place prior to the decision in *Miller* v. *California,* 413 U. S. 15 (1973). The same is true of all the cases cited under this issue which dealt with press materials, not motion pictures.

Rather than being a case standing as the origin of an independent review doctrine, *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962) was a case where Mr. Justice Harlan and Mr. Justice Stewart were of the opinion that three magazines were not obscene under postal regulations found at 18 U.S.C. 1461. *Jacobellis* v. *Ohio,* 378 U. S. 174 (1964) did at least deal with a motion picture, described as having only one fragmentary and fleeting explicit love scene. Mr. Justice Brennan and Mr. Justice Goldberg found that such a film was not obscene under the then applicable constitutional standards, and Mr. Justice Stewart simply stated that it was not hardcore pornography. Finally, *Jenkins* v. *Georgia,* 418 U. S. 153 (1974) dealt with a trial held before the guidelines of *Miller* were handed down, and it dealt with a film Carnal Knowledge, wherein sex acts were simply understood to be taking place and no explicit sex acts were actually exhibited.

In sharp contrast to the above are the films "Getting Off" and "Painful Desires," wherein the jury found both films to be obscene under a Kentucky por-

nography law specifically revised in 1974 to comply with this court's mandate in *Miller*. Petitioners have represented to this court that the films' contents is similar to the materials reviewed in *Jenkins*, when nothing could be further from the truth. Although the subject matter of both films is sex, they differ like night and day from the materials in *Jenkins* for the films are made up of the following explicit sex scenes: numerous specific and explicit acts of sexual intercourse, oral sodomy, anal sodomy, cunnilingus, flagellation, insertion of foreign objects into vaginal area, ejaculation of semen into the mouths, faces and bodies of individuals, and numerous other acts of sexual contact and gratification. An independent review of these films by the court will show the dominance of obscene material. *Kois* v. *Wisconsin*, 408 U. S. 229 (1972).

As found by the jury in the case at bar, the motion picture films "Getting Off" and "Painful Desires" are obscene. They do constitute hard core sexual material. As such, they have no constitutional protection under the First and Fourteenth Amendments of the United States Constitution. The Petitioners' convictions should therefore be affirmed.

CONCLUSION

Wherefore, the Commonwealth of Kentucky respectfully submits that all the proceedings of the trial court were proper and without error, that the Kentucky Court of Appeals and the Kentucky Supreme Court properly denied discretionary review, that there are no special or extraordinary reasons for the U. S. Supreme Court to grant discretionary review, and that, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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